Supreme Court, U.S.
FILED

(1)

NO. 97 1255 DEC 11 1997

OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1997

STUART H. SMITH, JR.
Petitioner

VERSUS

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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26 pp

QUESTIONS PRESENTED FOR REVIEW

I.

The liability of the United States, pursuant to the Federal Tort Claims Act, for damages resulting from conclusions reached by a United States Coast Guard investigating officer included in the Record of Investigation, and the effect of those conclusions as reflected in the plaintiff's Coast Guard record as the holder of a Merchant Marine Officer's License, issued by the Coast Guard, as the Agency responsible for determination of competency and administration of discipline.

II.

The entitlement of the Plaintiff to counsel fees, where the Court found eligibility for counsel fees, but not entitlement when the Coast Guard could give no explanation for a 3-1/2 year delay in production, and then only after filing of suit.

CERTIFICATE OF INTERESTED PARTIES

That the undersigned counsel of record certifies that the following persons or agencies have an interest in the outcome of this case:

STUART H. SMITH, JR.

UNITED STATES OF AMERICA, DEPARTMENT OF TRANSPORTATION,

UNITED STATES COAST GUARD

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STATEMENT OF THE BASIS FOR JURISDICTION

Plaintiff, STUART H. SMITH, JR., brings this Petition For Writ of Certiorari to review the Decision of the United States Court of Appeals for the Fifth Circuit of September 12, 1997.

The jurisdiction of this Court rests in 28 U.S.C. 1254(1)

Statutes Applicable:

5 U.S.C. 552. (Freedom of Information Act)

28 U.S.C. 2674-80 (Federal Tort Claims Act)

Jurisdictional Basis for the United States Court of Appeals for the Fifth Circuit is found in 28 U.S.C. 1291.

STATEMENT OF STATUTES INVOLVED

28 U.S. 2674-80 - Federal Tort Claims Act

"The United States shall be liable, respecting the provisions relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but should not be liable for interest prior to judgment or for punitive damages..."

5 U.S.C. 552(a)(4)(A)-Freedom of Information Act

"...The Court may assess against the United States reasonable attorneys fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed..."

STATEMENT OF THE CASE

On October 3, 1992, STUART H. SMITH, JR. was the holder of a Merchant Marine Officer's License, issued by the United States Coast Guard. SMITH was signed on Coastwise Articles as Third Officer of the SS STONEWALL JACKSON, a steam-powered vessel, documented under the laws of the United States.

On October 3, 1992, SMITH was stationed on the vessel's stern as the STONEWALL JACKSON left its berth in the Port of New Orleans. The mooring lines were let go and tugs assisted the ship into the main course of the river.

For reasons which were never determined, the STONEWALL JACKSON backed into the wharf and damaged the shore structure and her stern. The incident was reported to the local Office of Marine Inspection, and an investigation was conducted by the Coast Guard. On October 4, 1992, SMITH was brought before the Master, and an entry made in the Ship's Offical Log Book indicating his employment was terminated because of his failure to relay accurate information to the Master.

On October 8, 1992, a Freedom of Information Act request was submitted by SMITH for access to the material produced in the investigation. Throughout the early phases of the case, every effort was made by SMITH and his counsel to obtain the record of the investigation, including statements and documents forming the basis for the investigating officer's ultimate conclusions.

On July 16, 1993, SMITH brought a Complaint in the United States District Court for the Eastern District of Louisiana against Waterman Steamship Corporation for wrongful discharge. Waterman answered, citing the Official Coast Guard record, which set forth the Coast Guard report of the incident, and the conclusion that the casualty was the result of SMITH's sole fault, negligence and breach of duty.[1]

On November 30, 1995, the District Court dismissed SMITH's Complaint pursuant to Rule 12(E) of the Federal Rules of Civil Procedure.

SMITH received no response to his request from October, 1992 to June, 1995. On June 19, 1995, SMITH brought suit against the Coast Guard pursuant to the Federal Tort Claims Act and the Freedom of Information Act. The Court dismissed the Federal Tort Claims Act on October 11, 1995, but reserved the Freedom of Information Act Claim.

On December 4, 1996, the District Court found that the Coast Guard had not complied with the statute requiring the production of information, but denied recovery of counsel fees.

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[1] In an effort to obtain the material relied on by the investigating officer in support of his conclusion, counsel for SMITH noticed the deposition of the investigating officer and the Commander, Eighth Coast Guard District, and caused subpoenas to be issued. The witnesses did not respond to the subpoenas, and counsel for SMITH brought a Motion to Hold the Officers in Contempt, or In the Alternative, to Permit the Taking of Their Oral Depositions. The Contempt Motion was not heard by the Court.

ARGUMENT

I.

THE DISTRICT COURT WAS IN ERROR IN DISMISSING THE COMPLAINT PURSUANT TO RULE 12(E) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The District Court dismissed Plaintiff's Complaint under the Federal Tort Claims Act[2] on the ground that the claim was for defamation excluded under the Act.

As a general rule, a Complaint must set forth facts which constitute a cause of action, and is not subject to dismissal unless it appears that the Plaintiff is not entitled to relief under any set of facts which could prove his allegations.[3]

Even then, the court should not dismiss the Complaint except after offering the Plaintiff every opportunity to state a claim upon which relief can be granted. Dismissal is justified only if it appears beyond doubt that no set of facts can support the Plaintiff's claim for relief.

Plaintiff has alleged a cause of action consistent with 28 U.S.C. 2674 which provides:

"The United States shall be liable, respecting the provisions relating to tort claims, in the same manner and

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[2] 28 U.S.C. 2680(h)

[3] *Rodriguez v. U.S.*, 66 F.3d 95 (CA 5-1995); *Budger v. Bureau of Prisons*, 65 F.3d. 48 (CA 5-1995); *Matter of U.S. Abatement Corp.*, 39 F.3d. 556 (CA 5-1994).

> to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to Judgment or for punitive damages..."

STUART SMITH alleged negligence on the part of the Coast Guard in the conduct of the investigation of a marine casualty. Negligence is not one of the exceptions to liability available to the United States under the Act.[4]

In the reasons for dismissing SMITH's claim, the Court cited *Bosco v. U.S. Army Corp. of Engineers*:[5]

> "It is from such allegation that the gravamen of Plaintiff's complaint is injury to his reputation which is the interest protected by the defamation.."

Defamation is not specifically included among the exceptions in 28 U.S.C. 2680(h), and is not a separate or distinct tort, but rather an inclusive term, to include libel and slander, and employs communication of information by one party to another, either in writing or orally.[6]

In this case, it is not suggested that the Coast Guard, or the Coast Guard personnel intentionally sought to damage the Plaintiff's reputation. Nor is it suggested that the contents of the report were purposely, deliberately, or maliciously published or communicated to third parties. In fact, it is not suggested that the information went to anyone outside the

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[4] 28 U.S.C. 2680(h)

[5] 611 F.S. 449, 453 (ND - Texas, 1985).

[6] Restatement of Law of Torts, 2d § 558.

Coast Guard. The Coast Guard has the statutory responsibility for maintaining and enforcing professional standards for licensing and certification of Merchant Marine officers. Implicit in that responsibility is a commensurate degree of care in carrying out its function relating to discipline and qualification of licensed officers.

The Coast Guard is required by statute to prescribe regulations for the investigation of marine casualties to determine their cause, whether by an act of misconduct, incompetence, negligence, or unskillfulness; whether there has been a violation of rules and regulations by any individual holding a Coast Guard license or certificate; or whether an act of misconduct, incompetence, negligence, unskillfulness, or a willful violation of law contributed to the casualty.[7] If an investigation is conducted, the holder of a license or certificate or registry is entitled to representation by counsel to cross-examine witnesses and to call witnesses on his own behalf.[8] As the licensing agency of the United States[9] for merchant marine officers, license and certificates are issued by the Coast Guard contingent upon a determination that the applicant demonstrates proficiency, that he (or she) has the "requisite general knowledge and skill to hold a license" and he (or she) maintains an adequate knowledge of the waters to be navigated and knowledge of regulations for the prevention of collision in those waters, and meets other requirements considered reasonable and necessary.

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[7] 46 U.S.C. §6301.

[8] SMITH was not designated a part of the investigation. He was not permitted to cross-examine witnesses or to compel the attendance of witnesses at a hearing.

[9] 46 U.S.C. §7101.

In this instance, investigating officer attributed the collision to improper or inaccurate estimates of distance given by the Plaintiff. Those conclusions did not have to be communicated to third persons to cause damage to SMITH's professional status; they immediately became part of the official record maintained by the Coast Guard and to be considered in actions dealing with renewal or issuance of merchant marine officer licenses or pilotage endorsements. Once the report with the erroneous conclusions became part of the record, the damage had been done. Citing *Kugel v. United States,* [10] the Court suggested that the dissemination of information assorted with the investigation is what caused damage to the Plaintiff. The damage sustained by the Plaintiff was the fact that the product of a less than thorough investigation became part of his official Coast Guard record where it will remain. It is SMITH's contention that the Coast Guard investigation, as an operational function, was flawed and that the investigating officer overlooked or was unaware of several problems involving the ship's main propulsion system which, if disclosed, could have exonerated him from any responsibility for the allision. There is no indication that this area of inquiry was ever considered by the investigating officer.

As the agency responsible for qualification and licensing of merchant marine officers, Coast Guard maintained the record of the investigation, as well as personnel records which may well result in the denial or loss of a license by that agency to Mr. SMITH.

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[10] 947 F.2d. 1504, 1507 (DC Cir. 1991).

II.

PLAINTIFF'S ENTITLEMENT TO COUNSEL FEES UNDER THE FREEDOM OF INFORMATION ACT.

The District Court entered Judgment in favor of SMITH and against the United States finding that he was eligible for an award of attorneys fees, but was not entitled to them. It is suggested that SMITH is entitled to counsel fees by reason of failure of the Coast Guard to initiate a search for the records requested for almost three (3) years after the initial request was made.[11]

The Court found that SMITH was required to bring the suit against the Coast Guard to obtain the requested information, and which had been withheld from him from October, 1992 until May, 1996. In fact, in June, 1993, the Coast Guard terminated all efforts to process SMITH's request without any notification to him. In the absence of litigation, the document still would have been produced. SMITH's Freedom of Information Act suit was the principal cause of the Coast Guard's eventual compliance in May, 1996. For these reasons, the Court determined that SMITH was eligible for counsel fees.

The District Court found that SMITH had prevailed in his objective of acquiring documents which were the subject of his request, and was eligible for an award. The Court however found that SMITH had not shown entitlement to an award, and an award of counsel fees would neither benefit the public or serve as a deterrent to agency obduracy.

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[11] 5 U.S.C. 552(a)(4)(A). The Act provides that: "The Court may assess against the United States for reasonable attoreny's fees and other litigation costs reasonably incurred in any case under this section in which the Complainant had substantially prevailed...".

The Court found that:

> "...The evidence in this case is that the Coast Guard's noncompliance was due to administrative ineptitude rather than any unwillingness to comply with SMITH's Freedom of Information Act Request...".

The District Court found that the Coast Guard offered no explanation for it "gross non-compliance with Freedom of Information Act. .". If such administrative and bureaucratic ineptitude is responsible for a three and one half year delay in responding to the requests for information, then such ineptitude should be exposed to public scrutiny.

The line between administrative ineptitude, gross negligence, and bad faith becomes very fine indeed, particularly in view of the Coast Guard's abandonment of efforts to make the records available in July, 1993 without advising SMITH of its action.

The original intent of the Act was to create a policy of broad disclosure of information. As originally enacted, there was no provision for attorney's fees. The Act was subsequently amended to provide attorney's fees for substantially prevailing plaintiffs.[12]

Courts in some circuits have allowed interim awards of attorney's fees to prevailing parties before cases have been concluded.[13]

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[12] *Powell v. U.S. Department of Justice*, 569 F.S. 1192 (ND CAL - 1983).

[13] *Powell v. U.S. Department of Justice*, supra; *Baldridge v. Shapiro*, 455 U.S. 45 (1982).

Congress enacted the provision in the Act to insure citizens access to courts to vindicate their statutory rights and to remove the incentive for administrative resistance to disclosure of information based on the knowledge that many individual plaintiffs do not have the financial resources or economic incentives to pursue the requests through litigation.[14]

The action (or inaction) of the Coast Guard in this case illustrates the purpose of the Act — to discourage government foot dragging in response to a request under the Act to produce information not covered in any of the statutes exceptions.

Bureaucratic inaptitude is not far removed from bad faith or obduracy in considering a response to a request.

Respectfully,

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[14] *Nationwide Building Materials v. Saipem*, 559 F.2d 704; 710-13.

CERTIFICATE

This is to certify that copies of the Petition For Writ of Certiorari have been served by United States mail, first class, postage prepaid, on The Solicitor General of the United States, Room 5614, Department of Justice, 10th and Constitution Avenue, N.W., Washington, DC 20530, this 11th day of December, 1997.

RALPH E. SMITH

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed Oct 6, 95

STUART H. SMITH, JR.	CIVIL ACTION
VERSUS	NO. 95-1950
UNITED STATES OF AMERICA	SECTION "I" (1)

ORDER AND REASONS

Before the Court is the United States' motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Having reviewed the motion, the memoranda of the parties, the record, and the law, the Court grants the motion.

Background

In October, 1992, Plaintiff Smith was employed as the third mate aboard the SS STONEWALL JACKSON. At that time, the SS STONEWALL JACKSON was docked at the Pauline Street Wharf in New Orleans and was preparing to head to sea. Smith was assigned to the stern of the ship and was directed to report to the bridge the distances between the stern of the vessel and the wharf as the vessel pulled away from the Pauline Street Wharf. During this maneuver, the stern of the vessel hit the wharf. The United States Coast Guard investigated the incident, and determined that Smith

had given incorrect information to the bridge, which resulted in the allision. Smith was terminated the next day for failing to properly carry out his assigned duties.

In July, 1993, Smith filed a complaint for wrongful discharge.[1] This Court granted summary judgment in favor of the employer, finding that Smith was not wrongfully discharged.[2] Smith has now filed suit against the United Stated under the Federal Tort Claims Act contending that the Coast Guard conducted its investigation in a negligent fashion, the results of which caused damage to the plaintiff. Smith further contends that he has been damaged by the Coast Guard's denying him access to its records of the investigation and supporting documents.

The United States has moved to dismiss Smith's first cause of action, maintaining that Smith's petition contains a claim arising out of the intentional tort of defamation. The question now before the Court is whether Smith's claim falls into the intentional torts exception to the Federal Tort Claims Act.

Law and Analysis

When a defendant challenges the subject matter jurisdiction of a court, the burden is on the plaintiff to prove that jurisdiction exists. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507 (5th Cir. 1980). Smith argues that his cause

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[1] See *Stewart H. Smith, Jr. v. Waterman Steamship Corporation, et al*, civil action no. 93-2307, Section "I".

[2] See Order and Reasons entered January 6, 1994.

of action is one for negligence, and is properly brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, et seq. However, if the tort alleged in a FTCA case falls within one of the exceptions in §2680, then the district court lacks subject matter jurisdiction. *Morris v. United States,* 521 F.2d 872 (9th Cir. 1975).

When construing the FTCA, the Court must be mindful of the general principle that the United States may be liable for the torts of its employees only where there has been a "clear relinquishment of sovereign immunity." *Dalehite v. United States,* 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). The FTCA provides an exception from the waiver of soverign immunity for intentional torts wherein it states that:

> The provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title shall not apply to—
>
> > (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights...

28 U.S.C. §2680(h).

The Supreme Court's recent statement on this issue is that "the proper objective of a court attempting to construe one of the subsections of 2680 is to identify 'those circumstances which are within the words and reason of the exception'—no less and no more." *Kosak v. United States,* 465 U.S. 848, 104 S.Ct. 1519, 79 L.Ed.2d 860 (1984), quoting *Dalehite,* 346 U.S. at 31, 73 S.Ct. at 965). The Court must

look not only to the theory upon which the plaintiff elects to proceed, but rather to the substance of the claim which he asserts. *Lambertson v. United States,* 528 F.2d 441 (2d Cir. 1976).

In the instant case, Smith claims that as a result of the negligent performance and dereliction of duty of the investigating officer, and erroneous facts as set forth in the report of investigation, he has sustained loss of employment opportunities because of the blemish on his record, and continues to suffer reduced employment opportunities. Complaint, ¶ 14. It is clear to this Court that the gravamen of Smith's complaint is injury to reputation which is the interest protected by the law of defamation. The Court is mindful that the list of torts in 2680(h) is not exhaustive, *see Birnbaum v. United States,* 436 F.Supp. 967 (E.D.N.Y. 1977), and that defamation also fits into the exclusion. *See Bosco v. United States Army Corps of Engineers,* 611 F.Supp. 449 (D.C.Tex. 1985); *Art Metal-U.S.A., Inc. v. United States,* 753 F.2d 1151 (D.C. Cir. 1985); and *Kugel v. United States,* 947 F.2d 1504 (D.C. Cir. 1991).

In *Kugel,* the court was faced with a very similar situation where the plaintiff claimed that the negligent execution of an investigation by the FBI resulted in his losing contracts and being humiliated. The plaintiff tried to sue under the FTCA for negligent conduct of an investigation. The *Kugel* court held that the allegations that the FBI negligently executed its investigation arose out of defamation, an intentional tort, and could not support a claim under the FTCA.

This Court finds *Kugel* to be exactly on point, and concludes that the cause of Smith's injury was not the Coast

Guard's execution of the investigation, but its dissemination of the information associated with the investigation. The Court therefore finds that Smith's claim arises from alleged defamation by the Coast Guard which is excluded from the FTCA.

The Court will not permit the obvious attempt by Smith to circumvent the §2680(h) exception by merely relabeling the theory under which he seeks recovery. A litigant may not simply substitute the name of a cause of action which is not included in § 2680 for one that is included where the alleged breach of duties in the two claims are identical. *Art Metal-U.S.A. v. United States,* 753 F.2d 1151 (D.C. Cir. 1985). The substance of Smith's complaint here clearly is an intentional tort which is barred under the FTCA.

Considering the conclusion reached above, the Court need not address the United States' contention that this suit is in admiralty and has prescribed.

Accordingly,

IT IS ORDERED that defendant's motion to dismiss plaintiff's first cause of action for lack of subject matter jurisdiction is **GRANTED.**

New Orleans, Louisiana this 5th day of October, 1995.

/s/ Harry A. Mentz, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed Oct 11, 95

STUART H. SMITH, JR.	CIVIL ACTION
VERSUS	NO. 95-1950
UNITED STATES OF AMERICA	SECTION "I" (1)

J U D G M E N T

Considering the court's Order and Reasons dated October 5, 1995, and further considering the court's direction as to entry of judgment;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, United States of America, and against plaintiff, Stuart H. Smith, Jr., dismissing plaintiff's complaint at his cost.

New Orleans, Louisiana, this 11th day of October, 1995.

/s/ Harry A. Mentz, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed Nov 1, 95

STUART H. SMITH, JR.	CIVIL ACTION
VERSUS	NO. 95-1950
UNITED STATES OF AMERICA	SECTION "I" (1)

ORDER AND REASONS

Before the Court is a motion for reconsideration filed by Plaintiff Smith and a memorandum in opposition by Defendant United States of America. There being no need for oral argument, the matter is taken on the briefs.

Plaintiff asks this Court to reconsider its ruling granting Defendant's motion to dismiss first cause of action. In that ruling, the Court found that the actions alleged by Plaintiff in his complaint arose from an intentional tort which is excluded from the Federal Tort Claims Act. After considering the pleadings of the parties, the Court denies the motion for reconsideration.

LAW AND ANALYSIS

Although the Federal Rules of Civil Procedure do not particularly recognize the "motion for reconsideration", district courts will often accept such motions as being in the

interest of substantial justice. *See* F.R.C.P. 8(f). However, a motion to reconsider based on recycled arguments only serves to waste the resources of the court. *State of Louisiana v. Sprint Communications Co.*, 1995 WL 539233 (M.D.La. 1995). Therefore, rulings should only be reconsidered where the moving party has presented substantial reasons for reconsideration. *Id.* A motion for reconsideration should not give the losing party opportunity to simply reargue his losing points and authorities. *Shields v. Shetler*, 120 F.R.D. 123 (D.Co. 1988).

Considering the above standard, the Court must deny Plaintiff's motion. Plaintiff has advanced no new theories or authorities which the Court did not consider in the first instance.

Finally, the Court need not amend the judgment to preserve Plaintiff's claims pursuant to the Freedom of Information Act, as only the claims relating to intentional torts under the Federal Tort Claims Act were dismissed.

Accordingly,

IT IS ORDERED that Plaintiff's motion for rehearing or to amend order is **DENIED.**

New Orleans, Louisiana this 14th day of November, 1995.

/s/ Harry A. Mentz, Jr.
UNITED STATES DISTRICT JUDGE

(2)

FILED

NO. 97 1255 DEC 11 1997

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

STUART H. SMITH, JR.
Petitioner

VERSUS

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

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APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

STUART H. SMITH, JR.	CIVIL ACTION
VERSUS	NO. 95-1950
UNITED STATES OF AMERICA	SECTION: "I" (1)

FILED
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ORDER AND REASONS

This suit arises out of the October 3, 1992 allision between the S/S STONEWALL JACKSON and the Pauline Street Wharf in New Orleans, Louisiana. Plaintiff Stuart H. Smith, Jr. filed this complaint under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, on June 19, 1995 seeking the United States Coast Guard's investigative files from its investigation of the allision. Smith was employed by Waterman Steamship Corporation as Third Officer aboard the S/S STONEWALL JACKSON at the time of the allision, but was terminated the day after for failing to properly carry out his assigned duties in connection with the incident.

In July, 1993, Smith filed a complaint for wrongful discharge against Waterman. *See Smith v. Waterman Steam*

DATE OF ENTRY Dec 04 1996

PLAINTIFF'S EXHIBIT
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ship Corp., No. 93-2307 (E.D.La. Section "I"). That suit was dismissed by order entered January 6, 1994, finding that Smith was not wrongfully terminated because he was employed-at-will. *Id.*

Smith alleges in the present suit that his ability to prosecute his claim in the employment suit was prejudiced by the Coast Guard's delay in complying with his FOIA request for documents relative to the investigation of the allision. Smith seeks an order finding the United States "liable," an order compelling production of the entire investigative file on the allision, and attorney fees.

Before the court are cross-motions for summary judgment. The defendant United States seeks summary judgment on the ground that the Coast Guard conducted a proper search for the requested documents and in fact, has now produced all requested documents, thus satisfying its obligations under FOIA. Smith seeks summary judgment on the ground that the Coast Guard has not conducted a reasonable search for the documents, citing a three-year delay in production. For the reasons stated below, the United States's motion for summary judgment is denied; and the plaintiff's motion for summary judgment is granted in part.

I. BACKGROUND

Immediately after the allision on October 3, 1992, an investigator with the Coast Guard Marine Safety Office in New Orleans (MSNO) interviewed witnesses, obtained signed statements, and copied logs, bell books and casualty reports.

On October 8, 1992, Smith made a written request to

the "officer in charge, Marine Inspection, United States Coast Guard" in New Orleans for copies of "all investigative material, including statements." On October 13, 1992, the MSONO mailed a notice stating that Smith's request was forwarded to the Commandant of the Coast Guard at headquarters because that was where the records requested were held.

The Coast Guard completed its investigation of the allision on January 26, 1993.

On April 15, 1993, M. E. Schremp, Chief, Systems Support Branch of the United States Coast Guard Headquarters, responded to the request. She produced only a computer printout of investigative information which had been entered into the Coast Guard's computer file known as the Marine Safety Investigation System (MSIS). The computer data consisted of capsuled information from the incident. The computer data included the names of witnesses, but did not provide the substance of their statements. At that point, Smith was not provided with copies of witness statements or any other material used to generate the computer file.

Over the course of the next several months, Smith made several further requests to headquarters for specific document and information related to the investigation of the allision, and repeatedly expressed his dissatisfaction with the Coast Guard's production. A chronology of the correspondence and events is summarized below.

On June 6 and 10, 1993, Schremp informed Smith that the Coast Guard had "undertaken additional searches of our Marine Safety Information System and associated files," and

had "determined that as of this date, there is no additional information in regard to this incident."

Rebuffed by headquarters, Smith wrote to the MSONO on June 17, 1993, asking for all investigative material believed to exist and particular witness statements.

On July 9, 1993, the MSONO responded to Smith's request with a letter stating that "copies of the requested records are attached." Smith acknowledges receipt of the letter, but contends that no documents were attached.

By letter dated June 25, 1993, Smith appealed the Coast Guard's response to his FOIA request. He stated that the Coast Guard response was insufficient baecause he did not receive copies of particular statements which he knew to exist — those of Jerome J. Dorman, J. Kelly Duncan, an unnamed witness on the wharf, and the pilot Alphonso Ajubita.

In July, 1993, Smith filed his employment lawsuit against Waterman.

On July 14, 1993, Smith reiterated his request to the MSONO for the statements of the particular witnesses he believed were in the elusive investigation file — including the pilot and an additional witness on the wharf.

The MSONO responded on July 22, 1993 with a letter stating that "copies of the requested records are attached." Smith denies receiving this letter.

Smith's employment suit was dismissed on January 6, 1994.

On April 21, 1995, Smith wrote headquarters stating that to date the only information he was provided by the

Coast Guard was the computer print-out.

On May 2, 1995, two and one-half years after Smith's original request, Angela Marra, Attorney Advisor to the United States Coast Guard, Maintenance and Logistics Command Atlantic, Governors Island, New York, produced the statements of three individuals, including the statements of Jerome J. Dorman, one of the witnesses — Gerald Rex Graham, and the vessel's official log. The Coast Guard did not produce the requested statements of the pilot, J. Kelly Duncan, or the other unnamed witness.

Smith filed the present lawsuit on June 19, 1995.

On July 14, 1995, Coast Guard headquarters released eight more documents to Smith, including the statement J. Kelly Duncan. The Coast Guard still did not produce the statement of the pilot or the second witness, now identified as John L. McElroy.

In December, 1995, Thelma Flood, an FOIA coordinator with the Marine Resource Information Division in Washington, D.C. (MRID) was assigned to conduct a search for the requested records. Her affidavit details the steps she undertook to conduct the search, which included contacting the MSONO. For five months she found no new information. Then, in May, 1996, she found in her desk cabinet at the MRID a file containing sixteen items regarding the allision. These items included witness statements, some of which had been produced previously and some which had not, investigative notes, a drug and alcohol testing report, and an envelope of photographs. Flood testified in deposition that she found the file in the course of moving her office to a new location and that she had not previously discovered it because

her desk cabinet was not a place where such information was likely to be found. She offered no explanation as to how the file came to be in her desk cabinet.

On May 15, 1996, Chief Warrant Officer L. B. Franck telephoned Smith's attorney regarding the newly located information. Based on that discussion, on May 17, 1996 Franck faxed and mailed to Smith's attorney the information found in Flood's desk excluding certain agreed upon material subject to exemption.[1] Among these documents was the long-sought statement of the pilot, Alphonso M. Ajubita, and the statment of John L. McElroy, the second witness.

II. LAW AND ANALYSIS

A. Coast Guards Motion for Summary Judgment

Summary judgment is available to the defendant in an FOIA case where the agency proves that it has fully discharged its obligations under FOIA. *See Weisberg v. United States,* 705 F.2d 1344, 1350 (D.C. Cir. 1983); *Washington Post Co. v. Unted States Dept. of State,* 840 F.2d 26, 29 (D.C. Cir. 1988). An agency's obligation is to make a good faith effort to conduct a search using methods reasonably calculated to produce the information requested. *Cerveny v. CIA,* 445 F.Supp. 772, 775 (D. Colo. 1978).

The agency has the burden of justifying non-disclosure. *United States Dept. of Justice v. Reporters Comm. for Freedom of Press,* 489 U.S. 749, 762, 109 S. Ct. 1468, 1476, 103 L.Ed.2d 774 (1989). In order to sustain this burden, the agency must

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[1] Smith agreed to the deletion of the exempted material.

prove that the requested documents either have been produced, are unidentifiable, are exempt from the Act's inspection requirements, or do not in fact exist. *See Weber v. Coney,* 642 F.2d 91 (5th Cir. 1981); *Lawyer's Comm. for Human Rights v. INS,* 721 F. Supp. 552 (S.D.N.Y. 1989). The underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester. *See Miller v. United States Dept. of State,* 779 F.2d 1378, 1382 (8th Cir. 1986).

In this case, there is no issue regarding whether any of the documents were exempt from disclosure. At issue is whether the Coast Guard's search was reasonable, and if not, whether it acted in bad faith. The reasonableness of an agency's search depends on the facts of each case. *See Weisberg,* 705 F.2d at 1350, *Zemansky v. EPA,* 767 F.2d 569 (9th Cir. 1985).

The agency may prove the reasonableness of its search through submission of detailed, non-conclusory affidavits or declarations which identify the documents at issue and explain why the documents were not released. *King v. United States,* 830 F.2d 210, 217 (D.C. Cir. 1987). The affidavits must set out a reasonably detailed and non-conclusory description of the steps the agency took in searching for the requested materials, as well as a general description of the structure of the agency's file system together with an explanation of how all files likely to contain responsive information were searched and how further search would be overly burdensome. *See Oglesby v. United States Dept. of Navy,* 920 F.2d 57, 68 (D.C. Cir. 1990); *Church of Scientology of Cal. v. IRS,* 792 F.2d 146, 151 (D.C. Cir. 1986); *Miller,* 779 F.2d at 1384; *Hayden v. Nat'l Sec. Agency,* 608 F.2d 1381, 1387 (D.C. Cir. 1979), *cert. denied,* 446 U.S. 937, 100 S.Ct. 2156, 64 L.Ed.2d 790 (1980).

The standard of reasonableness does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the materials sought. In other words, an agency must make a diligent search for the requested documents in the places in which they might be expected to be found. An "agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Ogelsby,* 920 F.2d at 68.

Once the agency provides such affidavits, the burden shifts to the requester to raise a substantial and material factual issue in regard to the reasonableness of the search. *Miller,* 779 at 1384. This can be done either by contradicting the agency's account of the search procedure or by raising evidence of the agency's bad faith. Therefore, summary judgment in favor of an agency is warranted only if the agency's affidavits are uncontroverted by evidence in the record or by evidence of agency bad faith. *Id.*

The affidavits submitted by the Coast Guard are not sufficient to satisfy its initial burden of proof. The Coast Guard submitted only two affidavits in this case — one from Thelma Flood, the FOIA Coordinator of the MRID at Coast Guard Headquarters, and the other from Chief Warrant Officer L. B. Franck, FOIA Coordinator of the Office of Information Management at Coast Guard Headquarters. Flood first handled Smith's FOIA request in December, 1995, and Franck first received files regarding this FOIA request in April, 1996. Thus, neither Flood nor Franck have any personal knowledge as to the Coast Guard's search efforts during the three-year period following Smith's FOIA request in October, 1992, and consequently, their affidavits do not address what steps were undertaken to search for the information during that three-year period. Instead, their affidavits simply summarize the correspondence between Smith and

the Coast Guard. The affidavits address the details of the search procedures only for the time period of December, 1995 when Flood started her search, until May, 1996. Neither of the affidavits submitted describe the Coast Guard's information storage system, nor explain why all locations likely to contain responsive information were not searched prior to December, 1995.

The affidavits do establish that ultimately, over three years after Smith's initial FOIA request, after Smith's administrative appeal, and after Smith filed his present lawsuit the Coast Guard finally conducted a search reasonably calculated to uncover information requested. The fact of eventual compliance after legal pressure was brought to bear does not validate the Coast Guard's response to Smith's FOIA request. The Coast Guard has offered no explanation for its three-year delay in conducting a reasonable search.

Considering the total failure of the Coast Guard's affidavits to show that it made a reasonable search at any time during the three years following Smith's FOIA request, the court finds as a matter of law that the Coast Guard is not entitled to summary judgment. *See Pollack v. United States Bureau of Prisons*, 879 F.2d 406 (8th Cir. 1989) (finding that agency's affidavits failed to establish the reasonableness of its search). Accordingly, the Coast Guard is not entitled to summary judgment.

B. Smith's Motion for Summary Judgment

Even though the Coast Guard ultimately conducted a search that satisfies the requirements of the FOIA, the uncontroverted evidence establishes that it failed to discharge

its obligations in a reasonable manner. The deposition of testimony of M. E. Schremp, the Chief of the Systems Support Branch at Coast Guard Headquarters, shows that neither she nor anyone else at headquarters made any search for records beyond the MSIS. She did not contact the MSONO even though it was the New Orleans office which conducted the investigation of the allision. She also testified that she made no attempt to forward the request to other departments or branches that might have the information sought. She did not advise Smith that she had not searched for the actual materials he had requested. To the contrary, she advised him, that she had searched "associated files," when in fact she had not. She nevertheless stated to Smith in letters dated June 6 and 10, 1993, that there was no other information regarding the allision besides the computed print out. Schremp's testimony is uncontroverted.

In addition, the affidavits, together with the correspondence between Smith and the Coast Guard, show that the Coast Guard did not produce any material in response to Smith's FOIA request for six months. At that point, the Coast Guard produced only a computed printout which Smith had not requested. The Coast Guard's response made no mention of the actual material Smith had requested.

Even though Smith's request for records was narrow in scope and time, it took over three years before Smith received all of the particular witness statements he had requested. Until December, 1995, when Flood was assigned to search for information, no one at headquarters searched for the requested material in any location other than the MSIS.

Smith has shown that reasonable search procedures

were available which were not used. The Coast Guard completely denied the existence of information without looking in the places where such information would have been likely to be found, and where it was later found to exist. Considering the long-delayed and erratic responses to Smith's many requests, it is clear that the Coast Guard's conduct in this matter has been less than exemplary. The Coast Guard's behavior falls short of the spirit of the Department of Transportation's policy of "mak[ing] records available . . . promptly" and "to the greatest extent possible." 49 C.F.R. § 7.1 et seq. Thus, Smith is entitled to summary judgment finding that the Coast Guard failed to satisfy its obligation under the FOIA.

While the evidence shows that the search was not reasonable, it does not establish bad faith. *See Miller,* 779 F.2d at 1386. *See also Goland v. CIA,* 607 F.2d 339, 367, 370 (D.C. Cir. 1979). To prove bad faith a plaintiff must show that the government purposefully witheld documents, not that it merely delayed or was inefficient in producing them. *See Simon v. United States,* 587 F.Supp. 1029, 1032 (D.C. Cir.*1984); Republic of New Afrika v. FBI,* 645 F.Supp. 117, 122 (D.D.C. 1986). Considering the ultimate disclosure of all the documents specifically requested by Smith, and the lack of any evidence to show that the Coast Guard purposefully withheld the documents, this court finds as a matter of law that the Coast Guard has not acted in bad faith. *Miller,* 779 F.2d at 1386.

C. Smith's Request for Order Compelling Production

Smith seeks an order compelling production of documents and a judgment in his favor on the issue of "liabil-

ity." The FOIA does not provide a private action for money damages against an agency or its personnel. *See Daniel v. St. Louis VA. Regional Office,* 561 F.Supp. 250, 251 (E.D. Mo. 1983). The FOIA does provide remedies for violation of its provisions. Sections 552 (a) (4) (B) and (E) provide authority for district courts to act on complaints by (1) enjoining the agency from withholding agency records; (2) ordering production of such records; (3) assess against the United States reasonable attorney fees and other litigation costs.[2]

In this case, the Coast Guard did not release for many years several documents which Smith had specifically identified. It now appears that all of the requested documents have been forwarded to Smith. Smith alleges that there "may be other information" that has not been produced. Although Smith's belief that further documents may exist is certainly understandable, that belief alone is not sufficient to overcome Flood's affidavit and testimony regarding the search she undertook in December, 1995. *Miller,* 779 F.2d at 1386. Her affidavit states that she searched the Office of Chief Counsel, the Marine Investigation Office, the MRID, the MSIS, and the MSONO. She conducted her search over a three-month period. Her affidavit explained that she searched in all likely locations. That she was unable to locate any more documents, including those which she later found in her desk cabinet, does not render her search unreasonable.

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[2] In addition, secton 552(a) (4) (F) provides that if the court finds that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously, "the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding," and if such action is recommended, then the administrative authority is required to take corrective action.

Flood testified in deposition that she did not search her own desk because relevant documents were not likely to be located there. While it seems unobservant to overlook a file of documents within inches of one's desk, Smith has not offered any evidence to controvert Flood's affidavit. Smith has not suggested that other likely locations remain to be searched. There is no evidence that the Coast Guard is withholding any information other than the information that counsel agreed was exempt from disclosure. Accordingly, the court finds that an order compelling production is not warranted.

D. Smith's Request for Attorney Fees

Congress amended the FOIA in 1974 to authorize the award of attorney fees to parties who have "substantially prevailed." 5 U.S.C. § 552 (a) (4) (E).[3] A court order compelling disclosure is not necessary in order to have prevailed. Where, as here, there has been no court order compelling disclosure, the plaintiff may still establish that he substantially prevailed if he shows, first, that prosecution of the action was reasonably necessary to obtain the information; and second, that the existence of the lawsuit had a causative effect on the release of the information. *Lovell v. Alderete,* 630 F.2d 428, 432 (5th Cir. 1980); *Miller,* 779 F.2d at 1389.

The facts herein show that Smith was required to file this suit to obtain the information he requested. Considering

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[3] 5 U.S.C. § 552 (a) (4) (E) reads as follows:

> The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantialy prevailed.

the circumstances of this case, a reasonable person in Smith's position would have found it necessary to file a lawsuit. The record reflects that after June, 1993, the Coast Guard had discontinued processing the FOIA request. Further requests on Smith's part without the aid of litigation would not have produced the information he ultimately received. Smith was confronted by a situation where he had to either accept the Coast Guard's determination that it had no other information, or take action to compel the Coast Guard to search beyond the MSIS.

The facts also show that Smith's persistent litigation of his FOIA claim was the principal cause of the Coast Guard's eventual compliance with its FOIA obligations and release of all documents requested. The United States has not suggested that the documents were released in due course as part of an ongoing FOIA request process. Indeed, the record shows that the Coast Guard considered its search concluded in June, 1993. The court finds therefore that without Smith having pursued litigation, the Coast Guard would not have made any further production. Accordingly, Smith is eligible for attorney fees.

Once a plaintiff has shown himself eligible for attorney fees, the court must determine whether he is entitled to such an award. *Church of Scientology*, 653 F.2d at 587. There are four criteria to assist the court in exercising its discretion as to the award of attorney fees under the FOIA: "Among the factors which the court should consider when determining a prevailing litigant's entitlement to attorney fees under FOIA are: (1) the benefit to the public to be derived from the case; (2) commercial benefit to the complainant, (3) the nature of the complainant's interest in the records he seeks; and

(4) whether the government's withholding of the records had reasonable basis in law." *See LaSalle Extension Univ.*, 627 F.2d at 485; *Chivilis v. SEC*, 673 F.2d 1205, 1212 n. 16 (11th Cir. 1982).

The FOIA was enacted to provide information to the public rather than private litigants. In this case, Smith sought the documents at issue for his own personal benefit to clear himself of fault in the allision and to benefit himself financially in the litigation he brought against his employer. Smith's interest in these records is purely personal.

This is not a case where the agency has purposefully withheld documents from disclosure. The documents were not being withheld for any legal reason. Thus, there is no reason to scrutinize the legal basis under which the documents were withheld. The question is whether the government engaged in bad faith or obdurate behavior "merely to avoid embarrassment or to frustrate the requester." *See Frydman v. Dept. of Justice*, 852 F.Supp. 1497, 1508 (D. Kan. 1994), *aff'd*, 57 F.3d 1080 (10th Cir. 1995) (10-month delay does not show bad faith); *LaSalle Extension Univ. v. FTC*, 627 F.2d 481, 484 (D.C. Cir. 198) (quoting S.Rep. No. 854, 93d Cong., 2d Sess. 19 (1974)).

Smith's main argument in this respect is the long delay in light of the limited nature of his FOIA request. It is a serious liability to the government's position that it has offered no explanation for its gross noncompliance with the FOIA. The government did not act with due diligence, and has offered no reason to find that the delay was "unavoidable." Nevertheless, Smith has pointed to nothing that would support an affirmative finding of bad faith or

obdurate behavior on the part of the Coast Guard. The evidence in this case is that the Coast Guard's noncompliance was due to administrative ineptitude rather than any unwillingness to comply with Smith's FOIA request. Indeed, the fact that the Coast Guard immediately produced the information contained in the file discovered by Flood in May, 1996 indicates a good faith desire to satisfy Smith's request.

Smith has substantially prevailed in his objective of acquiring documents which were the subject of his FOIA request. His prosecution of this suit enabled him to ultimately obtain those documents. Therefore, Smith is eligible for an award of attorney fees. However, after applying the four criteria, the court finds that he has not shown entitlement to an award of attorney fees. An award would neither benefit the public nor serve as a deterrent to agency obduracy.

Accordingly,

IT IS ORDERED THAT:

(1) The United States' Motion for Summary Judgment is **DENIED**, and the plaintiff's Motion for Summary Judgment is **GRANTED IN PART** finding that the United States Coast Guard failed to satisfy its obligations under the Freedom of Information Act. Plaintiff's request for an order compelling production of documents and for attorney fees is **DENIED.**

(2) The clerk shall enter judgment herein in favor of the plaintiff and against the defendant.

New Orleans, Louisiana this 27th day of November, 1996.

/s/ Henry A. Mentz

UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

STUART H. SMITH, JR.	CIVIL ACTION
VERSUS	NO. 95-1950
UNITED STATES OF AMERICA	SECTION: "I" (1)

FILED
DEC 4 '96

JUDGMENT

This matter was brought before the court on cross-motions for summary judgment. In accordance with the Order and Reasons dated November 27th, 1996.

IT IS ORDERED, ADJUDGED, and DECREED that judgment is entered in favor of plaintiff Stuart H. Smith, Jr. and against defendant United States of America.

New Orleans, Louisiana this 3rd day of December, 1996.

/s/ Henry A. Mentz
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY Dec 04 1996

PLAINTIFF'S EXHIBIT
E

APPENDIX F

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

STUART H. SMITH, JR.	**CIVIL ACTION**
VERSUS	**NO. 95-1950**
UNITED STATES OF AMERICA	**SECTION: "I" (3)**

FILED
FEB 5 '97

ORDER

Having considered the parties' briefs on the plaintiff's motion for rehearing.

IT IS ORDERED that Plaintiff's Motion for Rehearing is DENIED.

New Orleans, Louisiana this 5th day of February, 1997.

/s/ Henry A. Mentz
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY FEB 06 1997

PLAINTIFF'S EXHIBIT
F

APPENDIX G

IN THE UNITED STATES
DISTRICT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-30184
USDC No. 95-CV-1950
Summary Calendar

FILED
SEP 12 1997

STUART H. SMITH, JR.

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before WIENER, BARKSDALE and EMILIO M. GARZA, Circuit Judges.*

PLAINTIFF'S EXHIBIT
G

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Stuart H. Smith, Jr., appeals the district court's dismissal of his claim under the Federal Tort Claims Act for lack of subject matter jurisdiction. Smith also appeals the denial of attorney fees following a partial summary judgment in his favor under the Freedom of Information Act and he argues that the district court should have ordered the United States Coast Guard to produce the "entire file" related to its investigation of a marine accident in which Smith was involved. We have reviewed the record and the briefs of the parties and AFFIRM for essentially the same reasons set forth by the district court. *Smith v. United States,* No. CA 95-1950 (E.D. La. October 6, 1995;

O R D E R
No. 97-30184

November 14, 1995; and December 4, 1996). Smith's request for discovery and production of documents is DENIED.

AFFIRMED; MOTION FOR DISCOVERY AND PRODUCTION OF DOCUMENTS DENIED.